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## Hefetz v. Beavor, 133 Nev. Adv. Op. 46 (July 6, 2017)

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CONTRACT LAW; CIVIL PROCEDURE: ONE-ACTION RULE

**Summary**

The Court determined that parties must timely assert the one-action rule as an affirmative defense in their response pleadings. If not, it is waived. As such, the District Court erred when it granted Respondent Beavor's motion to dismiss pursuant to the one-action rule because he failed to raise that defense in a timely manner.

**Background**

Pursuant to a loan agreement from March 29, 2007, the Herbert Frey Revocable Family Trust (the trust) issued a loan to Toluca Lake Vintage, LLC (Toluca lake) in the amount of \$6,000,000. Appellant Hefetz entered a participation agreement with the trust, contributing \$2,214,875 to the Toluca Lake loan's funding. The loan was used to buy property, and fund the engineering, marketing, and architects for the development of a commercial property. The loan was secured by Respondent Beavor's personal residence, as well as by a personal guaranty agreement. In this agreement, Beavor waived his rights under NRS 40.430, the Nevada one-action rule. Additionally, a loan provision stated that the loan would default if Toluca lake ever filed for bankruptcy.

Toluca Lake filed for bankruptcy in 2009, thus defaulting the loan. Beavor, however refused to repay the loan under the terms of the personal guaranty agreement. As a result, the trust assigned Hefetz the interest in the loan, promissory noted, deeds of trust and guaranty. Hefetz then filed a complaint against Beavor for breach of the agreement. Beavor did not assert the one-action rule in his answer, counterclaim, or amended counterclaim. The court extended the discovery and dispositive motion deadlines to July 23 and August 23, 2012, respectively. However, the parties stipulated that the deadline for any party to amend the pleadings has passed and the parties do not seek an extension of the February 21, 2012, date<sup>2</sup>. In 2013, a jury trial found in favor of Beavor. Hefetz filed a motion for a new trial, and because Beavor did not oppose the motion on the merits, the court set a second trial in 2015.

In the 2015 trial, Beavor raised the one-action rule defense in a motion to dismiss. The District Court granted Beavor's motion after a hearing and later granted Beavor attorney fees. Hefetz appealed arguing that (1) the district court erred by granting Beavor's motion to dismiss because Beavor had previously waived the one-action rule defense, and (2) that the district court abused its discretion by awarding attorney fees to Beavor.

**Discussion**

*The district court erred by granting Beavor's motion to dismiss*

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<sup>1</sup> By Julia Barker.

<sup>2</sup> *Hefetz v. Beavor*, 133 Nev. Adv. Op. 46, at 3 (July 6, 2017) (internal quotation marks omitted).

Both NRS 40.435(2)<sup>3</sup> and the NRCP § 8(c)<sup>4</sup> require parties to assert the one-action rule as an affirmative defense in a timely manner. Hefetz argued that because Beavor failed to assert the one-action rule as a defense until after the first trial, it was not raised in a timely manner and thus the District Court erred in granting Beavor’s motion to dismiss. On the other hand, Beavor argued that his raising of the rule was timely because NRS 40.435(3)<sup>5</sup> and NRS 40.495(5)(d)<sup>6</sup> prohibit waiver of the one-action rule prior to the entry of final judgment.

*This court has previously harmonized the statutory provisions of the one-action rule and the NRCP*

The one-action rule states that “there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate.” The rule requires creditors to seek recovery on property through judicial foreclosure prior to recovering damages from the debtor. If the creditor fails to do this, the debtor may raise the one-action rule as a defense in a motion to dismiss.

The Court harmonized NRS 40.435(2) and 40.435(1) by “holding that, while a debtor may be precluded from waiving the one-action rule in documents ‘relating to the sale of real property,’ he may waive the rule, intentionally or not, by failing to timely raise it as an affirmative defense after the commencement of the litigation.”<sup>7</sup> The Court clarified that the purpose of the one-action rule was to prevent creditors from seeking both personal recovery from the debtor and seeking recovery against the collateral.<sup>8</sup>

*NRS 40.495(5) does not alter the previously explained balance in the one-action rule*

Additionally, the Court rejected Beavor’s suggestion to interpret NRS 40.405(5) broadly because doing so would render the language stating that the rule must be “timely interposed as an affirmative defense” of the one-action rule.

Nevada Revised Statute 40.495(2) and (5) are exceptions to NRS 40.453, detailing waiver of the one-action rule in documents concerning the sale of real property—not litigation. As such interpreting NRS 40.453 and 40.495 harmoniously is possible because NRS 40.495(5) does not deal with waiver of the one-action rule during litigation.

The Court further clarified that NRS 40.435(3) does not prevent waiver of the rule earlier in litigation, it simply states that parties waive raising the one-action rule as a defense they have not asserted by the time the entry of final judgment is entered. Further, requiring waiver of the one-action rule after the entry of final judgment is necessary because it prevents the creditor from seeking recovery against the security as the creditor has already recovered against the debtor. As

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<sup>3</sup> NEV. REV. STAT. § 40.435(2).

<sup>4</sup> NEV. R. CIV. P. § 8(c)

<sup>5</sup> NEV. REV. STAT. § 40.435(3).

<sup>6</sup> NEV. REV. STAT. § 40.495(5)(d).

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Ibid.*

such, NRS 435.3(3) “does not prohibit a waiver of the one-action rule during litigation prior to entry of final judgment.”

*Beavor waived the one-action rule defense by failing to timely interpose it*

Beavor waived the right to assert the one-action rule as an affirmative defense because he failed to raise it in any of his pleadings during the first trial, did not raise it in his opposition to Hefetz’s motion for a new trial, and did not raise it in preparation for the second trial until the deadlines to amend the pleadings and for dispositive motions passed.

**Conclusion**

The Court held that Beavor failed to timely assert the one-action rule as a defense when Beavor failed to raise it in any of his pleadings during the first trial or in his opposition to Hefetz’s motion for a new trial. As such, the District Court erred in granting Beavor’s motion to dismiss pursuant to the one-action rule in the second trial because that defense was not timely asserted and thus waived. The Court reversed the District Court’s orders and vacated the courts award of attorney fees and costs to Beavor.